Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-777

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ENTERPRISE ASSOCIATION, LOCAL 638
OF THE UNITED ASSOCIATION,
Respondent.

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(1) and (3) of the Rules of this Court, the Air-Conditioning and Refrigeration Institute, Associated Builders and Contractors, Inc., American Boiler Manufacturers Association, American Consulting Engineers Council, The American Institute of Architects, Air Moving and Conditioning Association, Inc., Architectural Woodwork Institute, Mechanical Contractors Association of America, Inc., National Electrical Manufacturers Association, National Society of Professional Engineers, and National Woodwork Manufacturers Association respectfully move this Court for leave to file a brief as *amici curiae* in support of the petition for

writ of certiorari filed by the National Labor Relations Board in this case on November 28, 1975. In support of this motion, the above-named asosciations show as follows:

1. This motion for leave to file is necessary under Rule 42(1) and (3) because counsel for the Respondent Union has advised the undersigned in writing that he will not consent to the appearance of any *amicus curiae* in support of the petition in this case.

2. The issue presented by the petition for certiorari involves the validity of the "right to control" test used by the National Labor Relations Board in determining whether an employer being subjected to coercive union pressures in a work assignment dispute is a neutral employer entitled to protection from such coercion under Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B) (1970).

3. The status of the "right to control" doctrine is presently in dispute. The NLRB thoroughly analyzed and reaffirmed its adherence to the doctrine in *Local 438, United Association (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), and has continued to apply it. Since that decision, the doctrine has been specifically approved by the Fourth and Ninth Circuits (*George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir. 1973) and *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433 (9th Cir. 1975)), but it was rejected by the District of Columbia Circuit in the instant case by a vote of five to four.

4. Application of the "right to control" test has a substantial impact on the ability of building trades unions to effectuate product boycotts on construction projects. Such boycotts are a major weapon used by the unions to exclude prefabricated and factory-assem-

bled products and materials from construction sites and force resort to less efficient, and frequently less satisfactory, jobsite fabrication techniques. In *National Woodwork Manufacturers Ass'n* v. *N.L.R.B.*, 386 U.S. 612 (1967), this Court upheld the right of a union to engage in such a boycott for work preservation purposes in the limited circumstances in which the decision whether or not to use prefabricated products lay within the discretion of the striking employees' own immediate employer. In many instances, however, the authority to decide what products or methods of fabrication will be used rests exclusively with some third person who owes the union no collective bargaining duty, such as the architect, the consulting engineer, the project owner, or the manufacturer of the product in question, and the jobsite subcontractor is simply hired to install the completed product in accordance with their specifications. Yet, even in these circumstances, building trades unions frequently seek to exclude prefabricated products from the project to force other modifications in the project specifications by striking or threatening to strike the subcontractor who employs their members on the job. The "right to control" doctrine recognizes that economic pressures directed against the subcontractor in such circumstances are secondary and unlawful, unless the subcontractor's inability to control assignment of the work in question is the result of his own efforts to insulate himself from union work preservation pressures. Consequently, application of the "right to control" test effectuates the Congressional purpose of Section 8(b)(4)(B) by providing jobsite contractors with effective protection against involvement in disputes which they are powerless to resolve. It also protects the right of architects, engineers, builders and manufacturers to utilize the products and fabrication techniques best suited to the needs of their projects without interference from unions to whom they owe no bargaining duty.

5. The associations joining this motion have a substantial interest in the question thus presented by the petition for certiorari in this case. They represent a broad cross-section of the construction industry, including the designers, specifiers, manufacturers and installers of products and materials used in construction throughout the United States. Members of AIA, ACEC and NSPE design, specify and provide engineering services on all types of construction and therefore have a major role in deciding whether or not prefabricated and factory-assembled products are to be used in construction. ABMA, AMCA, ARI, AWI, NEMA and NWMA members are manufacturers of these products. They are installed by, among others, members of ABC and MCAA. The associations joining herein therefore have broad knowledge of problems arising out of efforts to exclude manufactured products from construction sites and of the effectiveness of the "right to control" doctrine in preventing such efforts. In particular, they have had experience with a number of product boycotts attributable, at least in part, to the present uncertainty about the validity of the "right to control" test. They have participated individually and jointly in numerous cases before the NLRB and the courts in which the validity and application of the doctrine have been litigated, including joint participation as *amici curiae* in each of the cases referred to in paragraph 3, above, as well as the proceedings before the court of appeals in the instant case. Because of this background and the extensive experience their constituents have had with product boycotts, the associations joining herein are uniquely situated to brief this Court on the practical, as well as the legal, reasons for granting the writ of certiorari in this case.

6. If granted leave to file, the movants will submit their *amicus curiae* brief a reasonable time prior to consideration of the petition for writ of certiorari.

The movants' *amicus curiae* brief will be short and can be submitted to the Court in printed form within 15 days following notification to counsel of the granting of this motion.

WHEREFORE it is respectfully moved that the above-named associations be granted leave to submit a brief as *amici curiae* in support of the petition for writ of certiorari in this case.

Respectfully submitted,

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Counsel for *Amici Curiae*

Dated at Washington, D.C.,
this 15th day of December, 1975.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of Motion for Leave to Submit Brief as *Amici Curiae* in Support of Petition for Writ of Certiorari have this day been served by certified mail, return receipt requested, upon the following parties:

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Dated at Washington, D.C.,
this 15th day of December, 1975.